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Chan Kim Seng v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05–53–03 OF 2015
DAVID WONG, ABDUL RAHMAN SEBLI AND ZAMANI A RAHIM JJCA
31 MARCH 2016

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant found guilty by trial court for trafficking in dangerous drugs — Whether evidence of prosecution's witnesses unreliable — Whether investigation by investigating officer unsatisfactory or flawed — Whether chain of evidence broken — Whether evidence of chemist reliable — Whether conviction safe — Dangerous Drug Act 1952 s 39B(1)(a)

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The appellant was charged for trafficking in dangerous drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the same Act. On 22 January 2013, PW6 and his officers entered into house in Stampin, Kuching and saw a lady named Dora sitting in the living room. Body search was conducted on her, but nothing incriminating was found. PW6 led his officers to the first floor and entered Room 3 where he saw the appellant. The appellant was sleeping and his hands were holding a bag tightly close to his belly. PW6 then woke him up, introduced himself and administered the caution under s 37B(1)(b) of the Act to the appellant in Mandarin through PW8. PW6 then seized the bag from the appellant's hand and examined its contents. Inside the bag, PW6 found in two separate packaging (exhs P11(b)(1–8) and P11(c)(1a)(1–24)) crystalline substance (which later found by PW5 to be methamphetamine) suspected to be *syabu* and seized it. PW6 lodged police report and all the exhibits and the appellant were subsequently handed over to investigating officer ('PW9'). At the close of the prosecution's case, the trial judge was satisfied that the prosecution had proven its case. Thus a prima facie case had been made out and the appellant was called upon to enter on his defence. According to the appellant, Room 3 was a common room shared by DW3 and Damien. He was playing computer games in the said room and fell asleep. He slept with his head leaning forward on his arms placed on the computer table. The appellant denied that he was holding a bag on his chest/belly while sleeping. The appellant stated that the drug was retrieved by PW6 from inside a computer speaker in Room 3 and was not found in the bag. He contended that Damien and his friend were in the said house on the day of the police raid, but both of them fled just before the police arrival. The appellant claimed that, when he wanted to play the computer games, he pushed aside the bag on the table to one side. The

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appellant accused PW6 of fixing him up. At the end of the trial, the court found that the appellant's defence was bare denial and had not cast a reasonable doubt on the prosecution's case. The appellant was found guilty and convicted and sentenced to death by hanging. Hence this appeal. The appellant submitted that: (a) the evidence of the main witnesses for the prosecution, PW6 and PW8 to prove that the appellant was in possession and trafficking in dangerous drug were unreliable; (b) the investigation into this case as a whole by PW9 was unsatisfactory or flawed; (c) the chain of evidence relating to the drugs exhibits was broken; (d) there were serious infirmities in the evidence of the chemist, PW5; and (e) having called for the defence, the trial judge failed to judicially appreciate the appellant's defence.

Held, affirming the conviction of the appellant:

(1) The court did not see any material discrepancy between the evidence of PW6 and PW8. From the questions posed to PW6 and PW8, their answers as well as their demonstrations showed that when the raiding party entered Room 3, the appellant was not doing anything. He was sleeping with his back leaning on the chair and his hands were over his belly, holding the 'Bally' bag (see paras 23 & 25).

(2) If a person demonstrably tells lies on one or two points, especially unrelated to a criminal proceeding where he is involved as a witness, then the whole of his evidence cannot be said to be unreliable in law. In this case, PW6's untruthfulness did not relate to the evidence whether the appellant was in possession of the drugs, but it concerned his whereabouts on 8 July 2014, when he was supposed to be present in court (see para 27).

(3) The chemist SP5 was reliable. The forensics in the chemistry department in Malaysia was accredited by ASCLO. In other words, PW5 had complied with the protocol of method of analysis adopted by the chemistry department. If learned counsel was unhappy with the evidence of PW5, the defence should produce its own expert witness to mount the challenge on the evidence of PW5 (see paras 38–39).

(4) There was no doubt in the identity of the drugs exhibits seized. They were identified by the prosecution witnesses as one and the same drugs seized at the scene, analysed by the chemist, PW5 and produced at the trial by the SP9. The torn envelope which was produced at the trial did not raise any doubt or caused to break the chain of evidence relating to the identity of the drugs. It should be noted that the analysis of the drugs exhibits was conducted well before the tear on the envelope which contained exhs P11(b)(1–8) and P11(c)(1a)(1–24) (see paras 36 & 41).

(5) Even if Damien was the owner of the impugned drugs (denied by the prosecution), the appellant could not be exonerated because the gravamen of the offence was against possession (see para 44).

(6) DW3 was an interested witness. The DW3's evidence relating to the presence of Damien and his friend and they had bolted from the house, prior to the police arrival was difficult to believe. DW3 was not an impartial witness. She was motivated to gloss her evidence with the intention of helping the brother (ie the appellant) who was facing a capital charge (see para 45).

(7) On the appellant's allegation that the police fixed or framed him up, there was no motive shown to exist. The appellant did not know PW6, PW8 and PW9 prior to his arrest and he was a stranger to them. Thus, there was no reason why the police officers were so mean to fix him up (see para 47).

(8) The two material evidence which formed a crucial part of the defence case were never put to PW6 and PW8 during the prosecution's case. Therefore, the appellant's defence was a bare denial and an afterthought on these points (see para 48).

[Bahasa Malaysia summary

Perayu dipertuduh mengedar dadah berbahaya, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') dan boleh dihukum di bawah s 39B(2) Akta yang sama. Pada 22 Januari 2013, PW6 dan pegawai-pegawainya memasuki sebuah rumah di Stampin, Kuching dan menemui seorang wanita bernama Dora duduk di dalam ruang tamu. Satu carian badan dijalankan terhadapnya tetapi tiada barang salah yang dijumpai. PW6 membawa pegawai-pegawainya ke tingkat pertama dan memasuki bilik ketiga di mana perayu dijumpai. Perayu sedang tidur dan kedua-dua-tangannya memegang rapat sebuah beg pada perutnya. PW6 mengejutkan perayu, memperkenalkan dirinya dan memberikan amaran di bawah s 37B(1)(b) Akta kepada perayu dalam Bahasa Mandarin menerusi PW8. PW6 kemudiannya merampas beg tersebut daripada tangan perayu dan memeriksa kandungannya. Di dalam beg tersebut, PW6 menjumpai dua bungkusan berasingan (eksh P11(b)(1–8) dan P11(c)(1a)(1–24) berisi serbuk kristal (yang kemudiannya didapati oleh PW5 mengandungi methamphetamine) disyaki syabu dan merampasnya. PW6 membuat laporan polis dan kesemua ekshibit dan perayu kemudiannya diserahkan kepada pegawai penyiasat ('PW9'). Di penghujung kes pendakwaan, hakim bicara berpuas hati bahawa pihak pendakwaan telah membuktikan kesnya. Oleh itu, kes prima facie telah dibuktikan dan perayu dipanggil memasukkan pembelaannya. Menurut perayu, bilik ketiga dikongsi bersama oleh DW3 dan Damien. Dia sedang bermain permainan komputer dalam bilik tersebut dan telah tertidur. Dia tidur dengan kepala tertangguk pada tangannya yang

diletakkan atas meja komputer. Perayu menafikan bahawa dia memegang beg tersebut atas dada/perutnya semasa tidur. Perayu menyatakan bahawa dadah diperolehi oleh PW6 daripada pembesar suara komputer dan bukan dalam beg. Dia menyatakan bahawa Damien dan kawannya berada dalam rumah tersebut pada hari serbuan polis tetapi kedua-duanya melepaskan diri sebelum ketibaan polis. Perayu menghujahkan bahawa, apabila dia hendak bermain permainan komputer, dia menolak beg tersebut ke satu bahagian. Perayu menuduh PW6 memerangkapnya. Di penghujung perbicaraan, mahkamah memutuskan bahawa pembelaan perayu adalah penafian semata-mata dan tidak membangkitkan keraguan mnasabah atas kes pendakwaan. Perayu didapati bersalah dan disabitkan serta dijatuhkan hukuman gantung sampai mati. Oleh itu, rayuan ini. Perayu menghujahkan bahawa: (a) keterangan saksi utama pendakwaan, PW6 dan PW8 untuk membuktikan bahawa perayu memiliki dan mengedar dadah berbahaya tidak boleh diterima; (b) secara keseluruhannya, penyiasatan kes ini oleh PW9 tidak memuaskan dan cacat; (c) rantai keterangan berkenaan ekshihit-ekshibit dadah terputus; (d) terdapat kelemahan serius dalam keterangan pakar kimia PW5; dan (e) setelah memanggil pembelaan, hakim bicara gagal mempertimbangkan pembelaan perayu secara kehakiman.

Diputuskan, mengesahkan sabitan perayu:

(1) Mahkamah tidak melihat apa-apa percanggahan antara keterangan PW6 dengan PW8. Berdasarkan soalan-soalan yang diajukan kepada PW6 dan PW8, jawapan dan demonstrasi mereka menunjukkan bahawa apabila pasukan serbuan memasuki bilik ketiga, perayu tidak berbuat apa-apa. Dia sedang tidur dengan bersandar pada kerusi dan tangannya di atas perut, memegang beg 'Bally' (lihat perenggan 23 & 25).

(2) Jika seseorang dibuktikan menipu mengenai satu atau dua fakta, terutamanya yang tidak berkaitan dengan prosiding jenayah di mana dia terlibat sebagai saksi, maka kesemua keterangannya tidak boleh dikatakan tidak boleh dipercayai dalam undang-undang. Dalam kes ini, ketidakjujuran PW6 ini tidak berkaitan dengan keterangan sama ada perayu memiliki dadah, tetapi berkenaan lokasinya pada 8 Julai 2014, apabila dia sepatutnya hadir di mahkamah (lihat perenggan 27).

(3) Ahli kimia SP5 boleh dipercayai. Forensik di Jabatan Kimia Malaysia diiktiraf oleh ASCLO. Dalam kata lain, PW5 telah mematuhi protokol kaedah analisis yang diguna pakai oleh jabatan kimia. Jika peguambela tidak berpuas hati dengan keterangan PW5, pembelaan perlu mengemukakan saksi pakar sendiri untuk mencabar keterangan PW5 (lihat perenggan 38–39).

(4) Tidak ada keraguan tentang identiti dadah yang dirampas. Kesemuanya telah dikenal pasti oleh saksi-saksi pendakwaan sebagai satu dan dadah yang sama dirampas di tempat kejadian, dianalisis oleh ahli kimia, PW5

dan dikemukakan semasa perbicaraan oleh SP9. Sampul surat yang koyak pada perbicaraan itu tidak menimbulkan apa-apa keraguan atau memutuskan rantaian keterangan berhubung identiti dadah. Analisis dadah yang diekshibitkan dijalankan dengan baik sebelum berlaku koyakan pada sampul surat yang mengandungi ekshs P11(b)(1–8) dan P11(c)(1a)(1–24) (lihat perenggan 36 & 41).

(5) Walaupun Damien adalah pemilik dadah yang menjadi pertikaian, (dinafikan oleh pihak pendakwaan), perayu tidak boleh dilepaskan kerana inti pati kesalahan ialah terhadap milikan (lihat perenggan 44).

(6) DW3 adalah saksi berkepentingan. Keterangan-keterangan DW3 berkaitan dengan kehadiran Damien dan rakannya dan bahawa mereka lari dari rumah, sebelum ketibaan pihak polis sukar dipercayai. DW3 bukan seorang saksi yang tidak berat sebelah. Dia terdorong menyembunyikan keterangan dengan niat membantu saudara lelakinya (iaitu perayu) yang menghadapi hukuman mati (lihat perenggan 45).

(7) Tiada motif yang dikemukakan untuk membuktikan dakwaan perayu bahawa pihak polis cuba memerangkapnya. Perayu tidak mengenali PW6, PW8 dan PW9 sebelum dia ditangkap dan dia orang asing buat mereka. Oleh itu, tidak ada sebab mengapa pegawai polis begitu kejam untuk memerangkapnya (lihat perenggan 47).

(8) Kedua-dua bahan bukti yang membentuk bahagian penting dalam kes pembelaan tidak pernah dikemukakan kepada PW6 dan PW8 semasa kes pendakwaan. Oleh itu, pembelaan perayu adalah penafian semata-mata dan sesuatu yang difikirkan kemudian semula (lihat perenggan 48).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 301–419.

Cases referred to

Liow Siow Long v PP [1970] 1 MLJ 40 (refd)
Shahrullah bin Abdul Rakeb v PP [2012] 4 MLJ 592; [2011] 1 LNS 1721, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 15(a), 37(da), 37B(1)(b), 39B(1)(a), (2), First Schedule

Appeal from: Criminal Trial No KCH-45D-1/5 of 2013 (High Court, Kuching)

Shankar RP Asnani (Thomas, Shankar Ram & Co Advocates) for the appellant. Muhammad Tajul Aariffin bin Musa (Deputy Public Prosecutor, Attorney

General's Chambers) for the respondent.

Zamani A Rahim JCA:

INTRODUCTION

[1] Chan Kim Seng, the appellant was charged in the High Court at Kuching for trafficking in dangerous drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the same Act. The charge reads as follows:

> Bahawa kamu pada 22.01.2013 jam lebih kurang 12.30 tengahari, di No. 717 Lorong A1 Taman BDC, Stampin, Kuching, di dalam Daerah Kuching di dalam Negeri Sarawak, telah mengedar dadah berbahaya iaitu methamphetamine seberat 78.31 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952.

THE PROSECUTION'S CASE

[2] Acting on information received, on 22 January 2013, at about 10.30am, before launching a raid, Insp Thomas ak Untol Bujang ('PW6') conducted a briefing of his personnel numbering seven of them, pertaining to illegal drug activity at a house No 717, Lorong A1, Taman BDC, Stampin, Kuching.

[3] On arrival there about two hours later, PW6 and his personnel entered the said house through its front door. The door was open. They saw a lady named Dora ak Dunggat ('Dora') who was an Iban, sitting in the living room. On the instruction of PW6, D/Cpl Nor Shafiqah made a body search on Dora, but nothing incriminating was found.

[4] From the living room, PW6 led five members of his raiding party consisting of D/Sgt Donny, D/Cpl Staward, D/Cpl Rashid, D/Cpl Afiq and L/Cpl Harman bin Ismail ('PW8') to the first floor of the said house. There were three rooms on the first floor and they entered Room 3 which was not locked. Inside Room 3, PW6 saw a male Chinese (later identified as the appellant). The appellant was sitting and leaning backward on a chair with a computer on the computer table in front of him. He was sleeping. The appellant's hands were holding a bag tightly close to his belly.

[5] PW6 then woke him up and introduced himself as a police officer from the Narcotic Department. PW6 administered the caution under s 37B(1)(b) of the Act to the appellant in Mandarin through PW8.

[6] Having cautioned the appellant, PW6 seized the bag from the appellant's hand. The bag was of 'Bally' brand, exh P11(a). PW6 opened the bag and examined its contents. Inside exh P11(a), PW6 found the following:

(a) a small black bag with a zip, exh P11(b) containing eight plastic packets of crystalline substance suspected to be *syabu*, exh P11(b)(1–8); and

(b) a black and white cloth bag, exh P11(c) containing a transparent plastic packet, exh P11(c)(1a). Inside exh P11(c)(1a), there were 24 transparent plastic packets of crystalline substance suspected to be *syabu*, exh P11(c)(1a)(1–24).

[7] All the exhibits were seized by PW6. Then, PW6 instructed his men to search the other two rooms in the presence of the appellant, but nothing incriminating was found.

[8] Thereafter PW6 and his men went downstairs (the ground floor). At the ground floor, PW6 saw Cpl Nor Shafiqah, Dora and a Chinese lady named Chan Kim Siok. She appeared from the kitchen. Chan Kim Siok was the appellant's sister who had just returned from work.

[9] Then PW6 and his personnel went outside the house where the Perodua Kelisa car bearing registration No QAE 212 war parked. The Perodua car was searched in the presence of the appellant. PW6 recovered a black bag exh P13(a) from inside a compartment under the steering wheel. He opened exh P13(a) and found it to contain three transparent plastic packets of crystalline substance, exh P13(a)(1–3) and a strip of Erimin–5 consisting of ten pills, exh P13(a)(4).

[10] All the exhibits were seized and the appellant and Dora were arrested by PW6. Both the appellant and Dora were brought to Jabatan Siasatan Jenayah Narkotik ('JSJN') at IPK Kuching for further investigation.

[11] At the JSJN office, on the instruction of PW6, Sgt Donny and Cpl Nor Shafiqah carried out the urine tests on the appellant and Dora's urine. The test on Dora's urine was proved to be positive for drug.

[12] After conducting the urine test, PW6 proceeded to weigh the drugs exhibits and then, he marked the exhibits by appending his signature and wrote the date of the arrest ie 22 January 2013. He also prepared a search list itemising all the exhibits, exh P15(a–b).

[13] Thereafter PW6 lodged the police report vide Sekama Report No 979/13, exh P14. The investigating officer ('IO'), Insp Irwan Iskandar bin Md Yassin ('PW9') was contacted where all the exhibits and the appellant were subsequently handed over to PW9.

[14] However, Dora was handed over to an assistant investigating officer, SM Armanathan who carried out a separate investigation on her for an offence of self-administration of drugs under s 15(a) of the Act.

[15] The material part of PW6's evidence was corroborated by the evidence of PW8.

[16] The IO, PW9 sent the crystalline substance exhs P11(b)(1–8) and P11(c)(1a)(1–24) and the crystalline substance exhibits P13(a)(1–3) and ten pills of Eramin-5 to the government chemist, Muzaiyanah bt Mohd Kaprawi ('PW5') for analysis. Upon analysis, PW5 confirmed as follows:

(a) the exhs P11(b)(1–8) and P11(c)(1a)(1–24) were methamphetamine, weighing 78.31g which was the subject matter of the charge; and

(b) the exhs P13(a)(1–3) and ten pills of Eramin-5 were methamphetamine and nimetazepam, weighing 3.79g and 0.04g respectively. No charge was preferred against the appellant in respect of these drugs which were recovered from the Perodua car.

[17] Methamphetamine is a dangerous drug listed in the First Schedule of the Act.

The findings of the trial judge at the close of the prosecution's case:

(a) the trial judge found the prosecution has adduced sufficient credible evidence through PW6 and PW8 that the appellant was holding the 'Bally' bag, exh P11(a) on his belly while he was sleeping on the declining chair. Inside the bag, exh P11(a), two small bags, exh P11(b) and exh P11(c) were found containing several unwrapped plastic packets, exhs P11(b)(1–8), P11(c)(1a) and P11(c)(1–24). The contents of these unwrapped plastic packets were clearly visible. Therefore, the trial judge found that the appellant was in physical custody, control and also having knowledge of the contents of exh P11(a). Thus, the prosecution has proven the element of possession;

(b) the government chemist, PW5 found that the crystalline substance in exhs P11(b)(1–8) and P11(c)(1a)(1–24) were methamphetamine, weighing 78.31g which formed the subject matter of the charge. The trial judge believed and accepted the evidence of the chemist, PW5; and

(c) having proved that the appellant was in possession 78.31g of methamphetamine, a dangerous drug, the statutory presumption of trafficking under s 37(da) of the Act was activated. The appellant was the trafficker of the drug.

[18] Upon maximum evaluation of all the evidence adduced by the prosecution at the close of the prosecution's case, the trial judge was satisfied that the prosecution has proved the charge of trafficking in dangerous drug against the appellant. Thus a prima facie case has been made out and the appellant's was called upon to enter on his defence as charged.

THE DEFENCE CASE

[19] The appellant elected to give evidence on oath:

(a) on 22 January 2013, at about 10am, the appellant's sister Chan Kim Siok ('DW3') invited him to her house at Lot 717, Lorong A1, Stampin BDC, Kuching for a meal. The house has three rooms in the upstairs, two of which were subletted to Damien who was Dora's boy friend. DW3 occupied the room in the downstairs;

(b) the appellant went to DW3's house. On arrival there, he initially played with his two-year old nephew for a while. Then he went to Room 3 which was located on the upper floor of the house. The Room 3 was shared by DW3 and Damien. It was a common room;

(c) in the said room, he was playing computer games. He fell asleep. He slept with his head leaning forward on his arms placed on the computer table. He denied that he was holding a bag on his chest/belly while sleeping as alleged by PW8;

(d) the appellant was awakened by the police who asked him to take out the 'thing'. In response, he asked the police 'what thing'? Thereafter the police proceeded to search the other room that was occupied by Damien and Dora, but nothing incriminating was found. Then, the police officers returned to Room 3 where PW6 and his men went straight to the computer speaker. From inside the speaker, PW6 retrieved the drugs in the presence of Damien and Dora. The appellant identified the said speaker and marked it 'X' as shown in photograph, exh D15. The drugs was not found in the bag, exh P6(13);

(e) the appellant informed the police that the drugs exhs P6(13–21) did not belong to him. His finger prints were not lifted from the exhibits. He learned from Dora that the drugs belonged to Damien;

(f) Damien and his friend were in the said house on the day of the police raid, but both of them fled just before the police arrival;

(g) according to the appellant, when he wanted to play the computer games, he pushed aside the bag, exh P6(13) which was on the table to one side; and

(h) the appellant accused PW6 of fixing him up.

The findings of the trial judge at the conclusion of the trial:

(a) the defence of the appellant was essentially that the drugs were not recovered from him. The police recovered the drugs from the computer speaker in Room 3. He was being fixed by the police. The drugs found and seized by the police belonged to one Damien;

(b) the presence of Damien and his friend in Room 3 prior to the police raid, was never put to the appropriate prosecution witnesses. The failure to put a crucial fact to the appropriate prosecution witnesses, during the prosecution's case may be regarded as an afterthought defence;

(c) on the allegation of a frame-up, the trial judge found it to be unbelievable and unsustainable as there was no animosity between the appellant and the police officer, PW6, PW8 and PW9. The appellant conceded that he did not know the police officers before the raid. In other words, the police officers were complete strangers to him;

(d) the Iban lady, Dora was offered to the defence at the close of the prosecution's case as her testimony was not essential to unfold the narrative of the prosecution's case. The trial judge found that the disappearance of Dora was not attributable to the prosecution and having regard the totality of the evidence, no miscarriage of justice had been caused to the defence;

(e) having considered the defence case, the trial judge did not believe DW3's version that Damien and his friend had fled the house before the police raid. DW3 was not an impartial witness, but rather motivated to fabricate the evidence to help the appellant who was facing a capital charge;

(f) the appellant failed to put his version of the story to the appropriate prosecution witnesses during the prosecution's case on the following facts:

(i) he was leaning forward on the computer table and not leaning backward on the chair;

(ii) the 'Bally' bag, exh P11(a) was on the computer table and he was not clutching the said bag on his belly; and

(iii) he brushed aside the empty 'Bally' bag, exh P11(a) when he wanted to play computer game;

(g) according DW2, the signature on the 'Senarai Bongkar' and the signatures in the 'Percakapan Dalam Pemeriksaan' were not the same author or of common authorship. The evidence of a document examiner, Lim Yok Chaw ('DW2') was not conclusive, unlike an expert on finger print impressions.

[20] Having regard to the totality of the evidence before the court, the trial judge found that the appellant's defence was a bare denial and has not cast a reasonable doubt on the prosecution's case. Thus, the prosecution has proved its case beyond reasonable doubt, hence the appellant was found guilty. He was convicted and sentenced to death by hanging.

THE APPEAL

[21] The appellant's petition of appeal dated 20 July 2015 was very lengthy and fashioned in the form of a written submission rather than listing the grounds of appeal. There are a total of 17 headings of grounds of appeal and we painstakingly summarised as follows:

(a) the evidence of the main witnesses for the prosecution, PW6 and PW8 to prove that the appellant was in possession and trafficking in dangerous drug were unreliable;

(b) that Room 3 where the drugs were recovered from the appellant was accessible to Dora, Damien, Fabian, Chee Shak Sen was not ascertained by PW9. Neither the allegation that the police had fixed or framed up the appellant had been investigated. The investigation into this case as a whole by PW9 was unsatisfactory or flawed;

(c) the chain of evidence relating to the drugs exhibits was broken — whether the drugs that were seized are the very same drugs that was handed to the chemist for analysis;

(d) there were serious infirmities in the evidence of the chemist, PW5; and

(e) having called for the defence, the trial judge failed to judicially appreciate the appellant's defence.

OUR DECISION

[22] It is undeniable that PW6 and PW8 are two key witnesses for the prosecution to prove that the appellant was holding a 'Bally' bag containing the impugned drugs on his belly while he was sleeping on a chair in Room 3. The prosecution sought to prove that the appellant was in possession of the impugned drugs.

[23] Learned counsel submitted that PW8 testified that when the raiding

party entered Room 3, the appellant was seen sleeping with his hands on his belly. He was doing nothing. PW8 did not mention that the appellant was holding a 'Bally' bag close to his chest. This is contrary to the evidence of PW6. PW6 said that the appellant was holding the 'Bally' bag on his belly. Because of this, learned counsel contended that the prosecution presented its case in two different versions and hence unreliable. Having scrutinised this part of PW6 and PW8's evidence, we do not see any material discrepancy in the evidence. It is pertinent at this juncture to refer to the testimony of PW6 as to what he saw when he entered Room 3. At p 526 of the appeal record, Vol 4, PW6 said as follows:

Q472 After you entered to Room 3, what did you do?

A Arriving at Room No 3, I find out the door was not locked. After I entered the room I find out that there is one Chinese man who was in a sitting position at one chair in front of the computer table. At that time the said Chinese man was sleeping on the said chair. I woke the suspect and introduced myself as police officer from Narcotic Department ...

Q473 Then what did you do?

A After that I made a search on the suspect and found that there was one black bag Bally which was at that time held tight to his stomach (Witness demonstrated how the suspect was holding the bag tightly to his stomach).

[24] The evidence of PW8 runs in this way. When he entered Room 3, he noticed as follows:

Q844 When you entered to the said room, what did you and the rest do?

A When we entered the room, we met the suspect.

Q845 What did the suspect do at that time?

A The suspect was sleeping leaning on the chair.

Q846 Then what happened?

A I woke the suspect.

Q847 You are the one who woke the suspect at that time?

A No, Inspector Thomas.

(after administrating and translating the caution)

Q860 Then what happened?

A I saw Inspector Thomas taking a bag from the suspect.

Q861 Did you see from where the suspect get the bag and give to Inspector Thomas?

A I saw Inspector Thomas took the bag from 'pelukan' suspect.

Q862 Can you demonstrate?

A Witness demonstrates. Witness stood up, putting both his arms across the stomach area.

[25] From the questions posed to PW6 and PW8, their answers as well as their demonstrations showed that when the raiding party entered Room 3, the appellant was not doing anything. He was sleeping with his back leaning on the chair. His hands were over his belly, holding the 'Bally' bag.

[26] In evaluating the testimony of PW6 and PW8, the trial judge found that there was no material contradiction in their evidence pertaining to the appellant holding the 'Bally' bag on his belly. The trial judge accepted their evidence as credible: see pp 527–528 of the appeal record, Vol 4.

[27] The appellant also complained that PW6 was also an untruthful witness. She was lying on his whereabout when he was supposed to be in court giving evidence. If a person demonstrably tells lies on one or two points, especially unrelated to a criminal proceeding where he is involved as a witness, then the whole of his evidence cannot be said to be unreliable in law. In this case, PW6's untruthfulness does not relate to the evidence whether the appellant was in possession of the drugs, but it concerned his whereabout on 8 July 2014, when he was supposed to be present in court. This is how Her Ladyship dealt with the incident:

> 77. It is unquestionable that PW6 has been less than honest as to why he failed to attend court on 8 July 2014. The question to be asked is whether his dishonesty on this occasion should render all this testimony in court as suspect, untruthful and unreliable. I recall PW8's testimony, which corroborates PW6's evidence in respect of the whereabouts of D/Kpl Nor Shafikah when the raiding party searched the 1st floor and from whom the drugs were seized in Room 3. Can the court believe PW8 and act on his corroborative evidence?

[28] Be that as it may, in considering the evidence of PW6 and PW8, the trial judge found them to be credible witnesses as regard the appellant holding the 'Bally' bag containing the impugned drugs while sleeping on the chair. The trial judge wrote at p 567 of the appeal record, Vol 4 as follows:

> 163. In my view, the accused by *physically holding* on to exhibit P11(a) raises the logical inference that the accused has not only knowledge of the contents in exhibit P11(a) and control over them, but also their composition. *Thus, the prosecution has proven the element of possession*.

[29] At the time of the police raid, there were other characters who were alleged to be present in the house. They were Dora, an Iban lady and her boyfriend named Damien. Damien was said to be one of the occupants of the said house.

[30] Learned counsel complained that the IO, PW9 had failed to investigate the involvement of Dora, Damien, Fabian Marip and Chan Kim Siok in relation to the impugned drugs. Their involvement could not lightly be disregarded as Dora was present in the house during the police raid. She was tested positive for drugs. However, according to the appellant, the drugs were found in the computer speaker. The impugned drugs belonged to Damien. Learned counsel's complaint may be put in this way. As the impugned drugs were seized from the computer speaker in Room 3 (and not from the appellant's belly), the appellant had no exclusive occupation of the said room. The said room was accessible to other persons such as Dora, Damien and Fabian Marip. Further the impugned drugs could not have been seized from the appellant as the appellant did not acknowledge it. He did not append his signature in the search list exh P18 as the private document examiner, DW2 confirmed that the signature in exh P18 was not his.

[31] The crux of the prosecution's case is that the impugned drugs were not recovered from Room 3 in the said house. The impugned drugs were found in the 'Bally' bag held by the appellant while he was sleeping. This is how the trial judge put it at p 529 of the appeal record, Vol 4 as follows:

> 31. The case of the prosecution is that the drugs seized during the raid was found inside the Bally bag that the accused was seen holding while he was sleeping on the chair in Room 3. In that connection, the prosecution had called PW6 and PW8 to unfold the narration of the circumstances under which the drugs were found and seized.

And at pp 566–567, the trial judge wrote:

> 163. In my view, the accused by physically holding on to exhibit P11(a) raises the logical inference that the accused has not only knowledge of the contents in exhibit P11(a) and control over them, but also their composition. Thus, the prosecution has proven the element of possession.

[32] Having found the appellant was in possession of 78.31g of the impugned drugs, the trial judge was also satisfied that the element of trafficking was proven by virtue of the presumption under s 37(da) of the Act. Her Ladyship concluded that a prima facie case had been made out against the appellant at the close of the prosecution's case.

[33] The prosecution's evidence, argued learned counsel, showed that there was a break in the chain of evidence pertaining to the identity of the drugs. Now let us examine the prosecution evidence on this aspect. From the moment of the impugned drugs were seized, they were in the custody of PW6. The impugned drugs were not mixed up with the drugs recovered from the motorcar, QAE 212. At the risk of repetition, the drugs found in the motorcar are not the subject matter of any criminal charge.

[34] The drugs exhibits were handed over by PW6 to the IO, PW9 who kept them under lock and key in his office. PW9 marked the drugs exhibits for identification purposes and thereafter the photographs of the exhibits were taken.

[35] PW9 sent the drugs exhibits including exhs P11(b)(1–8) and P11(c)(1a)(1–24) which were recovered from the appellant to the government chemist, PW5. PW5 acknowledged receipt of exhs P11(b)(1–8) and P11(c)(1a)(1–24) which were intact. Upon analysis PW5 confirmed that the exhs P11(b)(1–8) and P11(c)(1a)(1–24) were found to contain a total of 78.31g of methamphetamine.

[36] PW9 received back the drugs exhs P11(b)(1–8) and P11(c)(1a)(1–24) from PW5, he registered and kept them in the exhibit store. Exhibits P11(b)(1–8) and P11(c)(1a)(1–24) which were in the envelope were produced in the trial. Unfortunately the envelope was torn measuring approximately 12.5cm. There is no evidence as to when and how the tear had happened. It should be noted that the analysis of the drugs exhibits was conducted well before the tear on the envelope which contained exhs P11(b)(1–8) and P11(c)(1a)(1–24).

[37] Learned counsel raised the objection as the drugs exhs P11(b)(1–8) and P11(c)(1a)(1–24) were not re-analysed. The trial judge found a second analysis was unnecessary and immaterial as the drugs were earlier analysed by PW5. It was found to be methamphetamine, a dangerous drug listed in the First Schedule of the Act, weighing 78.31g.

[38] Contrary to learned counsel's contention the evidence of the chemist SP5 did not suffer any affirmities. The evidence of PW5 was reliable. PW5 described the analysis which she had conducted on the drugs as follows: (a) weighed the drugs, (b) homogenised the samples of the drugs, and (c) carried out the colour test, gas chromatography — mass spectrometer ('GCMS') and gas chromatography ('GC').

[39] Learned counsel took exception when PW5 failed to comply 100% with UNODC guidelines in her analysis. PW5 also said that the forensics in

A the chemistry department in Malaysia was accredited by ASCLO. In other words, PW5 had complied with the protocol of method of analysis adopted by the chemistry department and Her Ladyship said 'there is no reason to doubt the accuracy of her findings', see p 570 of the appeal record, Vol 4. If learned counsel is unhappy with the evidence of PW5, the defence should produce its B own expert witness to mount the challenge on the evidence of PW5.

[40] Learned trial judge believed and accepted the evidence of PW5 on the weight and analysis of the impugned drugs — methamphetamine and C nimetazepam — as listed in the First Schedule of the Act. Her Ladyship's findings can be seen at p 571 of the appeal record, Vol 4 as follows:

> 178. PW5's finding as stated in her report exhibit P10(a)(b) shows that the crystalline substance in exhibit P11(b)(1–8) and P11(c)(1a)(1–24) contain 78.31 grams of methamphetamine and the crystalline D substance in exhibit P13(a)(1–3) contain 3.79 grams of methamphetamine. The 10 pills contain 0.04 gram of nimetazepam. Both methamphetamine and nimetazepam are listed in the First Schedule of the DDA.
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> 180. I believe and accept PW5's finding on her analysis of the exhibits. E PW5, being an expert in drug analysis, has justified the court as to her method of analysis that she adopted in analysing the exhibits in this case.

F **[41]** Thus, there was no doubt in the identity of the drugs exhibits seized. They were identified by the prosecution witnesses as one and the same drugs seized at the scene, analysed by the chemist, PW5 and produced at the trial by the IO, SP9. The torn envelope which was produced at the trial did not raise any doubt or caused to break the chain of evidence relating to the identity of G the drugs.

[42] Further, learned counsel chose not to submit, but stand by his submission at the close of the prosecution's case at the conclusion of the defence case. However, learned counsel only made the submission in reply after the H prosecution's submission.

[43] In his defence, the appellant called two witnesses, namely, a private document examiner, DW2 and the appellant's younger sister, Chan Kim Sook ('DW3').

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[44] Essentially, the defence of the appellant was that the drugs were not found on him. The drugs were retrieved by the police from a computer speaker in Room 3. The impugned drugs belonged to one Damien and that the police had fixed him. Even if Damien was the owner of the impugned drugs (denied

by the prosecution), the appellant could not be exonerated because the gravamen of the offence is against possession.

[45] Having evaluated the evidence of the defence witnesses, the trial judge found DW3 to be an interested witness. She was the younger sister of the appellant. The DW3's evidence relating to the presence of Damien and his friend and they had bolted from the house, prior to the police arrival was difficult to believe. DW3 was not an impartial witness. She was motivated to gloss her evidence with the intention of helping the brother (ie the appellant) who was facing a capital charge: see *Liow Siow Long v Public Prosecutor* [1970] 1 MLJ 40.

[46] Learned trial judge also dealt with the disappearance of Dora at some length. Dora was offered and accepted by the defence. The defence could not call her as she had gone missing. Learned counsel alleged that the prosecution had a hand in the disappearance of Dora. As such the IO, PW9 was recalled by the prosecution to explain their attempts to trace Dora: see pp 585–587 to the appeal record, Vol 4. The trial judge tended to believe the explanation given by SP9 and she said:

> 58. I am inclined to believe that the prosecution has no part to play in the disappearance of Dora. Notwithstanding the disappearance of Dora [for reasons best known to herself], I am of the view that it has not caused miscarriage of justice to the defence when the totality of the evidence are considered.

[47] On the appellant's allegation that the police fixed or framed him up, there was no motive shown to exist. The appellant did not know PW6, PW8 and PW9 prior to his arrest. He was a stranger to them. Thus, there was no reason why the police officers were so mean to fix him up. The defence story of being framed in the circumstances of this case is far fetched and unbelievable: see *Shahrullah bin Abdul Rakeb v Public Prosecutor* [2012] 4 MLJ 592; [2011] 1 LNS 1721.

[48] In his defence the appellant advanced two material evidence, firstly, he was sleeping with his head on his hands/arms. The arms were placed on the table. He was not leaning backward on the chair as testified by PW6 and PW8; secondly, he brushed aside the empty 'Bally' bag on the table as he wanted to play the computer game. He was never clutching the 'Bally' bag on his belly. These two material evidence which formed a crucial part of the defence case was never put to PW6 and PW8 during the prosecution's case. The appellant's defence was, therefore, a bare denial and an afterthought on these points. The defence had, therefore, failed to cast a reasonable doubt on the prosecution's case, whilst the prosecution had proved its case beyond any reasonable doubt. This is how the trial judge wrapped up at the conclusion of her judgment:

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75. Having regard to the totality of the evidence adduced and presented before the court at the conclusion of the whole case, it is my finding that the accused's defence is a bare denial and has not cast a reasonable doubt on the prosecution case. On the other hand, the prosecution has proven beyond reasonable doubt the charged preferred against the accused.

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76. In the premise, I convict the accused as charged.

[49] Having given our anxious consideration in this case, we are in unanimous agreement that the trial judge had carefully addressed the defence case with reference to the prosecution's case and Her Ladyship found that no miscarriage of justice had been occasioned.

C

[50] There are no appealable errors committed by the trial judge to warrant our intervention. The conviction is safe. Accordingly, the conviction of the appellant is affirmed.

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Conviction of appellant affirmed.

Reported by Dzulqarnain Ab Fatar

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